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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 365

CITY OF NASHVILLE, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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Pursuant to Rule 16, paragraph 3, of the Rules of this Court, appellants oppose the motions to affirm filed herein, for the reasons stated below.

STATEMENT

In order to reply as concisely as possible to the briefs of appellees in support of their motions to affirm, we shall ignore contentions which were anticipated in the Jurisdictional Statement and reply only to new contentions made by appellees, to whom we shall refer as the L. & N. and the I.C.C. Since the L. & N. brief is in much greater detail than the I.C.C. brief, we shall make primary reference to the former in this reply, and then refer to any additional contentions made by the I.C.C.

The Report of the Commission has been officially reported, 295 I.C.C. 457.

ARGUMENT

Opening Statement
(Pages 2-4)

The L. & N. states that the merger became effective August 30, 1957, so that the N. & C. does not join in the motion to affirm. The L. & N. omits to state that, while the "Agreement of Merger" was tendered to the Secretary of State of Tennessee for filing, he declined to file it on advice of the Attorney General of Tennessee, and that the L. & N. has brought no proceeding similar to that in *Seaboard Air Line Railroad Co.* v. *Daniel*, (1948) 333 U. S. 118, to determine the questions of law involved. These questions are discussed in our Jurisdictional Statement under Question 10.

Question 1
(Pages 6-21)

The burden of the L. & N. argument, as well as that of the I.C.C., is that Section 5(2) of the Interstate Commerce Act, when read in the context of the "National Transportation Policy" (Transportation Act of 1940), and of its applicability to carriers by highway and water as well as by rail, must be interpreted in exactly the same way as old Section 5(4), when read in the context of the compulsory consolidation provisions of the Transportation Act of 1920, and of its applicability to rail carriers alone. The contention is that consolidation of railroads is still an "established national policy," citing *United States* v. *Lowden*, (1939) 308 U. S. 225, 232. It is contended that the only change made in the law is that voluntary mergers and consolidations have been substituted for compulsory consolidations, citing *Schwabacher* v. *United States*, (1948) 334 U. S. 182.

Congressional purpose may be manifested by context as well as by text. (*Addison* v. *Holly Hill Co.*, (1944) 322 U. S. 607, 615). The opinion in *McLean Trucking Co.* v. *United States*, (1944) 321 U. S. 67, makes clear that the congressional policy is no longer that of the Transportation Act of 1920.

Footnote 26 to the opinion in the *McLean Trucking* case (321 U. S. 86) quotes a statement made by Senator Wheeler in the Congressional discussion of the Motor Carrier Act of 1935, as follows:

> "At present most truck operations are small enterprises. However, there are many rumors of plans for the merging of existing operations into sizable systems. In view of past experience with railroad and public-utility unifications, it is regarded as necessary that the Commission have control over such developments, where the number of vehicles involved is sufficient to make the matter one of more than local importance."

The "control" of mergers and consolidations of railroads and water carriers as well as of truck lines was intended by Congress to be exercised in the "public interest," and one important facet of the public interest is the "preservation of independent and competing" units where that is feasible. (321 U. S. 87). If there is language in the *Schwabacher* opinion which could be construed as meaning that approval of railroad mergers and consolidations by the Commission should be merely a matter of form, to carry out a policy of encouraging transportation monopolies as being inherently desirable, it was unnecessary to the decision in that case.

Although the Commission itself made no such suggestion, the L. & N. undertakes to support the Commission's action on the theory that the N. & C. was a "weak" railroad which should be absorbed by a strong one in the public interest, and in support of the argument points to the "sharp decline in the operating results of the N. C. & St. L. in 1955 and 1956." (p. 11). The L. & N. omits to point out that this decline came about after the merger announcement and after the L. & N. had replaced independent N. & C. directors with L. & N. employees. (See L. & N. Answer, par. 12.3). The decline in earnings simply establishes the contentions made by the interveners in opposition to the merger, including the prediction that a large volume of traffic would be lost to other railroads. The mere announcement of the merger was, of course, sufficient to start such a ball rolling.

At pages 16-17, the L. & N. argues that the railroad industry is handicapped by "governmentally-subsidized competition" from airway, waterway, and highway transportation and by tax and regulatory laws which "discriminate against the railroads." The Commission had noted the new highway program which will aid the motor carrier industry, improvement of inland waterways at public expense, and the increasing Congressional appropriations for airport construction (295 I.C.C. 475-476) and had concluded that the merger will enable the L. & N. "to meet more effectively competition from other modes of transportation" (295 I.C.C. 504). But the "National Transportation Policy,"* by which the Commission is to be governed, calls for fair and impartial regulation of all modes of trans-

* 34 Stat. 899 (1940); 49 U. S. C., preceding Section 1.

portation, and the *McLean Trucking* decision emphasizes that Congress did not intend "to create one authority for rail consolidations and another for motor carriers," but that "identical provisions govern both." (321 U. S. 78-79).

The assumption underlying the Commission's approval of this merger is that Congress itself has discriminated against railroads by subsidizing other modes of transportation and that the Commission should counteract these Congressional inequities by exercising its regulatory powers so as to foster and promote railroad monopoly and thereby enable railroads to meet subsidized competition. Obviously, this basis for approval by the Commission of mergers of carriers is available only to railroads. The approval of railroad mergers on this theory violates the Congressional mandate that the Commission is to regulate the different modes of transportation impartially and by application of the same standards.

In the I.C.C. brief (page 8), it is said: "The appellants' real contention, that preservation of competition is the controlling legislative policy in Section 5, was rejected by this Court in *McLean Trucking Co.* v. *United States, supra.*" On the assumption that such is appellants' *real contention*, the I.C.C. argues that Question 1 is unsubstantial. But the I.C.C. has misstated appellants' real contention. We have not contended that preservation of competition is the *controlling* legislative policy in Section 5. We do contend that the Commission substituted a policy of its own for the policy of Congress.

Question 2

(Pages 21-34)

The appellees undertake in their briefs to support the order of the Commission and the decision of the District Court by the argument that, where one railroad has suppressed the greater part of another railroad's competition, by use of stock control, so that the elimination of the remaining competition between them is relatively insignificant, the Commission has no power to consider whether the existing suppression of competition has taken place in violation of the Sherman Act. The far-reaching consequences of such a contention, if sustained, are readily apparent; and we respectfully urge that if this were the only question at issue, the appeal would merit the fullest consideration by this Court.

Conspicuously absent from the appellees' briefs is any effort to deny that the existing suppression by the L. & N. of the competition of the N. & C. was and is in violation of the Sherman Act. The authorities cited in the Jurisdictional Statement to this effect are not mentioned and there is a complete avoidance of the subject.

The I.C.C. in its brief (page 11), says: "We are aware of no case in which the Commission has withheld approval of an application under Section 5 because of the asserted illegality of relationships entered into prior to the enactment of Section 5 in 1920." This is equivalent to saying that an asserted violation of Section 5 should be considered by the Commission, but an asserted violation of the Sherman Act should not be considered. No authority is cited in support of this

view. In *New York Central Securities Co.* v. *United States*, (1932) 287 U. S. 12, to which reference is made, there was no contention that the New York Central was suppressing the competition of the Big Four and Michigan Central in violation of the Sherman Act. The question before the Commission was that of "the public interest in having the control maintained." (287 U. S. 23). In the instant case the Commission did not consider "the public interest in having the control maintained," but only whether, on the implied assumption that the existing suppression of competition is consistent with the public interest, the further step of a merger is also consistent therewith.

Question 9

(Pages 35-49)

While quoting at some length from the transcript of the oral argument before the three-judge court, the L. & N. has omitted to quote two pertinent statements made by members of the Court which indicate what the Court was really attempting to do in incorporating the "express condition" with respect to seniority rights of employees in the final judgment. We quote as follows:

> "JUDGE DARR: (interrupting) When there is a merger, why, it doesn't matter about the size of the company. The employees should be taken care of according to seniority regardless of which road they were formerly employees." (Tr. 181).
>
> * * * * *
>
> "JUDGE MARTIN: Now, frankly, Brother Grubbs, here is what all three of us are concerned

with, and that is a [the] substantial justice of the case, and that is that the employees who are bumped off as a result of this merger should not be exclusively the employees of the NC&St.L." (Tr. 184).

To avoid duplication, we refer the Court, for further elaboration of Question 3, to the Jurisdictional Statement filed by the appellants, NC&StL Railway Employees Job Protection Association, et al., in No. 519. If the interpretation placed by the appellees on the "express condition" in the judgment is correct, the language in question is without any force or effect whatever, and its incorporation in the judgment was meaningless.

Question 4

(Pages 50-59)

Here the L. & N. contends that questions are raised which were not raised below. The questions presented were disposed of by the District Court in its Conclusion of Law No. 7. The request for a *subpoena duces tecum* was merely the preliminary means by which the interveners in opposition to the merger sought to obtain the evidence referred to. Having failed to obtain it this way, the interveners sought to obtain it on cross-examination.

The first sentence in Paragraph 7 of the Complaint reads as follows:

"7. The hearings were conducted on the erroneous procedural theory that since the burden of proof was on the applicants and it was

> 'their responsibility to decide, at their own risk, the nature and kind of evidence to be presented in support of the application,'

and since they complied with the Commission's order of October 14, 1950, and

> 'submitted ample evidence sufficient and adequate to sustain the material allegations contained in the application,' (Sheet 71, under caption 'Discussion and conclusions'),

the applicants were free to refuse to produce documents and figures called for on cross-examination for the purpose of testing the credibility, weight and value of the evidence actually offered, and that it was then proper for the Commission to make its findings of fact on the basis of the evidence actually offered, without considering the effect which the documents and figures called for on cross-examination might have had if they had been produced . . . . "

The action of the Examiner in sustaining applicants' objections was a "restriction on cross-examination." Clearly the questions presented were properly raised below, even though the exact phrase "restriction on cross-examination" was not used in the Complaint.

Question 5

(Pages 60-64)

The L. & N. vigorously denies that the Administrative Procedure Act as construed in *Universal Camera Corp.* v. *National Labor Relations Board*, (1951) 340 U. S. 474, "enlarged the scope of judicial review" with

respect to "such questions as are presented in a railroad merger case." (p. 61). In support of this contention, the L. & N. cites and quotes (p. 62) from the *McLean Trucking* case, 321 U. S. at pp. 87-88. But the *McLean Trucking* case was decided before the enactment of the Administrative Procedure Act.

The slant of the District Court toward its responsibilities with respect to the review of the Commission's order was foreshadowed in the following colloquy during the oral argument:

> "JUDGE MARTIN: . . . In the first instance, I would think that the Interstate Commerce Commission has to construe the act of Congress to see how to carry out the policy because it is a policy commission. It is given very broad expertise as Brother Frankfurter, I think, used the word a lot. As an expertise board or commission, it is given quite broad scope of power as you well know.
>
> MR. WALLER: I am talking about review.
>
> JUDGE MARTIN: In interpretation as well as in fact-finding for the public interest.
>
> MR. WALLER: I think there is squarely presented to Your Honors the question as to whether or not this Court can defer to any interpretation of the law by the Commission. I say not.
>
> JUDGE MARTIN: Well, of course, if an issue is put up to us clearly, as you are arguing here, that the Interstate Commerce Commission has misconstrued the policy of Congress, you are on sound ground and we will review; but what I

meant was that I thought you were stating the proposition a little too broadly in hurdling completely the policy power of the Interstate Commerce Commission in the first instance. It does have policy powers, I believe.

MR. WALLER: I don't think Congress delegated policy powers to the Interstate Commerce Commission.

JUDGE MARTIN: Well, they have exercised it, it seems to me, time and again throughout the years without challenge." (Tr. pp. 40-41).

In *Opp Cotton Mills* v. *Administrator*, (1941) 312 U. S. 126, at p. 145, this Court said:

> " . . . The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. . . . "

In *Addison* v. *Holly Hill Co.*, (1944) 322 U. S. 607, at p. 616, this Court said:

> " . . . The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

There is nothing in Conclusion of Law No. 6 to suggest that the District Court regarded the Commission's powers as being limited by these concepts. Apparently the District Court's views coincided completely with the views advanced by the L. & N. in its brief, both with respect to the powers of the Commission and the proper scope of judicial review. We think that these

views are erroneous, and that on such questions as the relative importance of preserving competition and the proper interpretation of the national transportation policy there is no administrative "expertise" which should induce judges to defer to commissioners.*

Finally, the L. & N. calls attention to the statement in the preliminary paragraph of the District Court's decision that the Court "has considered," among other things, "the entire record in the case." The problem is one not of semantics but of substance, and we question whether the Court intended to convey the impression that they, or any of them, had actually "reviewed the whole record, or such portions thereof as may be cited by any party," in making the determination that the findings of the Commission were supported by substantial evidence. The normal place for such a statement would have been in Conclusion of Law No. 5.

Questions 6 and 7

(Pages 64-67)

Again the L. & N. relies upon decisions antedating the Administrative Procedure Act, including the statement of Mr. Justice Cardozo in *Mississippi Valley Barge Line Co. v. United States*, (1934) 292 U. S. 282, 286-287, as to the exhaustion of the judicial function "when there is found to be a rational basis for the conclusions approved by the administrative body." But Mr. Justice Cardozo was speaking of "the structure of a rate schedule," —a technical and specialized subject.

* See Schwartz, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 Harvard Law Review 436 (1954).

Question 8

(Pages 67-77)

Here the L. & N. relies upon *Baltimore Transfer Co.* v. *Interstate Commerce Commission*, (1935) 114 F. Supp. 558 (affd. 346 U. S. 890), which indeed is cited three times in the brief. The District Court in that case was of the opinion that the question whether the Commission's orders were "supported by adequate findings and substantial evidence" involved "the application of the rule of administrative finality, which is that if the Commission's order is based upon adequate findings which, in turn, are supported by substantial evidence, it cannot be disturbed by a court on review, even though the court might consider the Commission's action wrong, and against the weight of the evidence.", citing the *McLean Trucking* case, among others. The Court then said (p. 564):

> "The Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., has not altered the rule of administrative finality. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456."

This conception of the "rule of administrative finality" differs from the usual conception of that rule. Cf. *Levers* v. *Anderson*, (1945) 326 U. S. 219. We submit that the *Baltimore Transfer* case is not a sound authority on the meaning and effect of the Administrative Procedure Act.

Question 9

(Pages 77-78)

The L. & N. relies upon the statement in the *McLean Trucking* case (321 U. S., pp. 87-88) that:

> " . . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' . . ."

Again we point out that this decision was rendered before the enactment of the Administrative Procedure Act. That Act requires the exercise by the courts of their own wisdom and experience, in reviewing administrative action, to determine whether the policy of Congress has actually been carried out, or whether the agency has allowed its determination to be influenced by prejudices and policy conceptions of its own with respect to what is consistent with the public interest. In the instant case the Commission made it abundantly clear that its conception of policy was to foster and promote railroad mergers and consolidations in order to counteract a supposed Congressional policy of "subsidizing" other forms of transportation, even where the involved railroads are competitive or potentially competitive, and neither of them is a "weak" railroad.

Question 10

(Pages 78-82)

The L. & N. states that the questions here presented were not presented below and cannot properly be considered by this Court. It is sufficient in answer to this contention to quote Paragraph 17 of the Complaint, which is as follows:

"17. Plaintiff further alleges that if the order of the Commission dated March 1, 1957, be construed as an order granting the applicants authority, without authorization by Tennessee law, to merge the Tennessee Company into the Kentucky Company, said order is to that extent void and of no effect. Plaintiff alleges that actually said order of the Commission is merely permissive and does not undertake to confer authority not given by state law. However, if plaintiff should be incorrect in this construction of the order, plaintiff would show to the Court that the charter of the Tennessee Company (Acts, Tennessee, 1845-6, Ch. 1 and amendments thereto) is a contract between the Tennessee Company and the State of Tennessee; that it contains no provision authorizing the Tennessee Company to extinguish or abandon its corporate existence and franchises by merger into a corporation of another state; that there is no general law in Tennessee which authorizes a railroad corporation incorporated by special act to extinguish or abandon its corporate existence and franchises in this manner; and that while any state law in conflict with a valid federal law is invalid, Congress has not, in Section 5 of the Interstate Commerce Act, as amended (Title 49, U. S. Code), or otherwise, conferred or attempted to confer on the Commission the power and authority to supply deficiencies in state corporation laws. If, however, Section 5 of the Interstate Commerce Act be construed as attempting to confer upon the Commission the power and authority to supply such statutory authority, where not supplied by state law, then Section 5 of the

> Interstate Commerce Act, as so construed, violates the Tenth Amendment to the Federal Constitution and is unconstitutional and void (Hopkins Savings Ass'n. v. Cleary, 296 U. S. 315)."

It is submitted that these allegations satisfy all requirements with respect to particularity in pleading, and that the question presented on the appeal is identical with that presented in the Complaint, although couched in different language.

The appellees undertake to distinguish *Hopkins Savings Association* v. *Cleary*, (1935) 296 U. S. 315, by asserting that the authority of the Commission over rail mergers is "exclusive and plenary." This language of Section 5(11) must be read, however, in connection with the last sentence, which says: "Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." This language means that Congress did not pre-empt the field now occupied by state corporation laws. The Tennessee corporation laws, providing for consolidations but not mergers of railroad companies, do not constitute a burden upon interstate commerce, and do not constitute "restraints, limitations and prohibitions of law" from the "operation" of which the railroads are "relieved" by Section 5(11) of the Interstate Commerce Act. *Seaboard R. Co.* v. *Daniel*, (1948) 333 U. S. 126, cited by the I.C.C. (p. 17), is distinguishable for this reason.

The L. & N. further contends that Section 65-601, Tennessee Code, authorizes this merger. This statute simply authorizes railroads to "acquire by purchase, lease or otherwise" other railroads. Obviously this language cannot be construed as an authorization of corporate mergers. The Attorney General of Tennessee does not think so and the L. & N. has sought no declaration from the Tennessee courts pursuant to which the Secretary of State would be authorized to file the "Agreement of Merger" on the basis of this or any other Tennessee statute.

Question 11

(Pages 82-86)

Since the contentions of appellees were anticipated in the Jurisdictional Statement, no further comment will be made.

Question 12

(Pages 87-89)

The L. & N. asserts (p. 89) that "it has been held that the thirty-day requirement of Section 15(2) applies only to orders entered under Section 15(1) of the Interstate Commerce Act," citing footnote 3 of the opinion in *United States* v. *American Ry. Express*, (1924) 265 U. S. 425, 430, where the provisions of Section 15(1) are related, followed by the sentence: "Paragraph 2, of § 15, deals only with the time when the orders under par. 1 take effect." The L. & N. would have the Court believe that the word "only" was intended to modify "orders under par. 1." We submit that the word "only" was intended to modify the entire clause, with emphasis on "the time." The L. & N.

omits to call the Court's attention to *U. S.* v. *Baltimore & Ohio R. Co.*, (1931) 284 U. S. 195, where an order under par. 6 of Section 15 was held void because of failure to comply with the thirty-day requirement.

We wish to emphasize that the opponents of the merger had only twenty-seven days within which to study the report of the Commission, prepare their Complaint, and arrange with the District Court for a hearing on a motion for a temporary restraining order after giving proper notice to the interested parties. Extensions *after* the Complaint was filed were of no help whatever, and did not have the effect of curing the invalidity of the order. Cf *U. S.* v. *Baltimore & Ohio R. Co.*, *supra*. Moreover, if the order was void, it is immaterial whether appellants were "prejudiced," and the argument of the I.C.C. (p. 20) that they were not prejudiced is beside the point.

Conclusion

(Pages 89-91)

The L. & N. quotes from the order of April 9, 1957, designating the three-judge court, which does not show on its face which judges were the "two other judges" designated by the Chief Judge of the Circuit. If an inference could be drawn from this order that District Judge Darr or District Judge Shelbourne sat as District Judge, and that Circuit Judge Martin was designated as one of the "two other judges," such inference is rebutted by Finding of Fact No. 16, reading as follows:

"16. A temporary restraining order was issued in this cause on April 8, 1957, by John D. Martin, United States Circuit Judge, sitting by designation during the present illness of William E. Miller, Judge of the United States District Court for the Middle District of Tennessee; and this cause was set for final hearing before a three-judge court on May 7, 1957. The Chief Judge of the United States Court of Appeals, Sixth Circuit, designated Leslie R. Darr, United States District Judge for the Eastern District of Tennessee, and Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, to sit as two members of the three-judge court, with United States Circuit Judge Martin completing the court. The designated three-judge court assembled and heard elaborate oral arguments at morning and afternoon sessions on May 7, 1957, following which the case was duly submitted."

Judge Martin had been designated to sit as a District Judge in the Middle District of Tennessee during the months of April and May, 1957, by order entered in the United States Court of Appeals for the Sixth Circuit on April 2, 1957, and in the United States District Court for the Middle District of Tennessee on April 4, 1957, which, omitting the caption, is as follows:

"Owing to a temporary illness of United States District Judge William E. Miller, of the Middle District of Tennessee, I hereby designate the Honorable John D. Martin, United States Circuit Judge, to sit as a District Judge in the Middle

District of Tennessee during the months of April and May of 1957, and to exercise all of the powers and duties of such Judge for the period designated and for such further period as it may become necessary to complete unfinished business.

"Executed at Cincinnati, Ohio, this 2d day of April, 1957.

CHARLES C. SIMONS,
Chief Judge,
United States Court of
Appeals for the Sixth
Circuit"

The question is whether the designation of two District Judges to sit with Judge Martin was a compliance with 28 U. S. C., Section 2284 (1) requiring the Chief Judge of the Circuit to designate "two other judges, at least one of whom shall be a circuit judge," to constitute the three-judge court in cases of this character.

CONCLUSION.

It is respectfully submitted that this appeal presents substantial questions warranting further argument before and full consideration by this Court. Therefore, it is requested that the motions to affirm filed herein by appellees be denied.

Respectfully submitted,

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